



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
HABITAT PROGRAM/OLYMPIA FIELD OFFICE
510 Desmond Drive SE/Suite 103
LACEY, WASHINGTON 98503
October 18, 2000

Ms. Leni Oman
Planning and Development Branch Manager
Environmental Affairs Office
Washington Department of Transportation
Olympia, Washington 98504-7300

Dear Ms. Oman:

Thank you for your letter requesting further explanation of language related to road maintenance activities adopted by the National Marine Fisheries Service (NMFS) under Section 4(d) of the Endangered Species Act (ESA). Compliance with this language is necessary in order for NMFS to limit the application of the prohibition against take of listed salmonids under the ESA from related activities of a jurisdiction.

In the 4(d) Rule, NMFS provided several avenues by which a jurisdiction could receive a limit of the take prohibition for road maintenance activities. Each will provide for properly functioning habitat condition at comparable levels of protection. Some question has arisen, however, about references in the rule to the use of and compliance with Oregon Department of Transportation's (ODOT) Transportation Maintenance Management System Water Quality and Habitat Guide (ODOT Guide). These questions have arisen in the context of collaborative negotiation of similar road maintenance programs such as those being conducted with the Washington Department of Transportation (WDOT) and within the so-called Tri-County initiative.

NMFS often finds different environmental conditions across the landscape that warrant different approaches to salmon conservation, even for similar types of activities like timber harvest or agricultural activities. Nonetheless, NMFS works diligently in collaborative negotiations to meet the needs of fish while allowing the shape of a conservation initiative to be formed largely by the sponsoring jurisdiction. As a result, measures and prescriptions in any two conservation initiatives addressing similar activities may appear substantially different, even though both provide for properly functioning habitat condition. NMFS is well aware that the existence of these differences allow some to examine the attributes of the initiatives looking for inconsistent application of NMFS standards for approval.

NMFS is aware, as you point out in your letter, that this issue has arisen when jurisdictions have attempted to compare the ODOT limit in the 4(d) Rule to similar road maintenance packages being negotiated with NMFS. NMFS maintains that the protections afforded listed salmonids by the ODOT limit in the 4(d) Rule raise to the same level as those being negotiated with the WDOT or within the so-called Tri-County negotiations. NMFS is not "raising the bar" over the ODOT program within these other discussions.



NMFS would like to provide several specific examples of the difficulty of comparing the ODOT 4(d) limit with those being developed for other jurisdictions. The first illustration is provided by the method under which ODOT directs management decisions at the site scale. After working with NMFS, ODOT provided text in the *Introduction* of the Guide explaining that words and phrases such as “where feasible,” “where appropriate” and “where practicable” do not provide broad discretion for convenience or ease of operation, but rather the application of professional judgement guided by a specific decision-matrix related to constraints such as weather, equipment or safety considerations. Even before inclusion of this language, NMFS already had substantial confidence that ODOT properly implements this direction because of the significant time and analysis (including nearly four years of monitoring) NMFS had devoted to development of the program with ODOT. In negotiations with other jurisdictions (with which NMFS does not have the extensive experience and simply cannot devote similar resources to program development), NMFS has suggested that such guidance specifically be included in the body of the road maintenance manual.

Training provisions of ODOT’s program provide a second example of the difficulty in comparing different programs. Also found in the *Introduction* to the ODOT Guide are the elements of ODOT’s training and outreach program essential for proper implementation of measures in the Guide. In adopting the 4(d) Rule language, NMFS was careful to capture this critical attribute of ODOT’s road maintenance program that supplements the Guide itself. The regulatory language of the 4(d) Rule not only requires compliance with the Guide, but also that the limitation applies only to activities conducted by “ODOT employees or agents.” This language effectively incorporates attributes of ODOT’s training program NMFS has concluded are critical to effective implementation of the ODOT Guide.

In other collaborations, jurisdictions are including provisions such as training and monitoring within the body of their road maintenance programs. NMFS favors this approach because NMFS does not anticipate developing the same level of experience with all the jurisdictions now interested in road maintenance as it did with ODOT while collaborating on the Guide. Again, NMFS explained this point in the Federal Register. In *Response to Comment 201*, NMFS made clear that “NMFS and ODOT have spent several years evaluating this program so that NMFS has a clear understanding of ODOT’s ability to fulfill training, tracking, and reporting requirements” and that, for other jurisdictions seeking to use the Guide, NMFS would have to make a separate, independent determination that their program would “meet or exceed” the protections provided by the ODOT Guide.

NMFS has approached its discussions with the WDOT and participants in the T&County negotiations with the goal of developing the most cost effective means of meeting properly functioning habitat conditions while conducting road maintenance activities. NMFS believes the emerging road maintenance programs in Washington provide the best paths to a limitation within the 4(d) Rule. Anything less than the programs developed within Washington simply would not be found to meet properly functioning habitat conditions and would not warrant a limitation of the take prohibition.

Again, thank you for your letter. I hope the information provided above is helpful in addressing the questions raised by local jurisdictions. NMFS continues to stand ready to work collaboratively with you and other jurisdictions on efforts to develop initiatives that meet the requirements of the 4(d) Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Turner". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Robert Turner
Washington Area Director